o. 22449

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EORGE CHROMIAK, JR.,

Appellant,

v.

AROLD V. FIELD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLEE'S BRIEF

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TOPICAL INDEX

LIST OF AUTHORITIES CITED

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE CHROMIAK, JR., Appellant, v. HAROLD V. FIELD, Appellee.	No. 22449

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2241.

STATEMENT OF FACTS

[As there was no evidentiary hearing below, the facts are taken from the records in the proceedings below.]

The petition below (USDC No. 67-973-Y) marks appellant's third challenge in the United States District Court for the Central District of California to his conviction for perjury in the Superior Court of the State of California.[1/] He now contends that section 170.6, subdivision (3), of the California Code of Civil Procedure and section 1203 of the California Penal Code are

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1. See USDC Nos. 66-344-Y and 66-47-C.

inconstitutional.

In the original case of People v. Hohensee, 251 A.C.A. 196 (1967), the People sought to convict Hohensee and another for conspiracy to defraud and to obtain money and property by false pretenses. Appellant here [Chromiak] was called by Hohensee as an expert witness in the criminal proceedings. As a result of his testimony appellant was charged with and convicted of perjury. He applied for probation which was denied. He was sentenced to imprisonment in the state prison, appealed this sentence, and was granted bail pending appeal. His conviction was affirmed by the Court of Appeal of the State of California, Fourth Appellate District. People v. Chromiak, 4th Crim. 2212.

Thereafter proceedings were instituted before the Honorable Gerald C. Thomas, Judge of the Superior Court of the State of California in and for the County of Los Angeles, to effect execution of the judgment. Appellant moved to disqualify Judge Thomas, under the provisions of section 170.5 of the Code of Civil Procedure of the State of California, from hearing further proceedings in the matter. The motion was heard by the Honorable Verne Warner and denied, and the case remanded to the rial court for sentencing. Appellant applied for probation which was again denied, and he was sentenced to prison for the term prescribed by law. From the orders denying his application for probation and his motion to disqualify the trial judge he appealed. On appeal, the rulings of the trial court were affirmed. People v. Chromiak, 4th Crim. 2471. (A copy of said opinion was attached to Response to Petition for Writ of Habeas Corpus, USDC No. 67-972 y.)

ARGUMENT

I

APPELLANT HAS NOT SHOWN THAT HE HAS BEEN DENIED ANY RIGHT GUARANTEED EITHER BY THE UNITED STATES CONSTITUTION OR BY STATE LAW

A. Section 170.6 of the California Code of Civil Procedure, Though Not Applicable to the Present Case is Nonetheless Constitutional.

Appellant challenges the constitutionality of section 170.6, subdivision (3), of the California Code of Civil Procedure, which sets forth the procedure whereby a party may disqualify a trial judge. This procedure, appellant contends, unfairly and unconstitutionally shifts the burden of proof to the moving party.

The constitutionality of section 170.6, however, has no bearing on the present case, as that statute did not come into play at the trial below. Appellant's motion to relieve the judge was made under section 170.5 of the California Code of Civil Procedure, not section 170.6, subdivision (3). People v. Chromiak, 4th Crim. 2471.

California law provides two means whereby a party may challenge the fitness of a judge to try a case. Under section 170 of the California Code of Civil Procedure, when the moving party makes his allegations of prejudice the matter is transferred to another court where a judge determines the truth of the allegations. Section 170.6, on the other hand, provides a means whereby a party may, in effect, peremptorily challenge a judge. Under this section a mere affidavit of prejudice will cause the removal of the judge from the matter. Such an

affidavit, however, has to be filed prior to the beginning of trial.

Appellant, however, did not follow the procedure of section 170.6 and make a peremptory challenge. In fact, he could not have made a section 170.6 peremptory challenge as his challenge was made at the conclusion of the trial. Appellant challenged the judge for prejudice, under section 170.5, and the court so treated his motion as a challenge for prejudice. Accordingly, appellant may not complain about the constitutionality of section 170.6 when he never used this statute at the trial below.

Be this as it may, the procedures established for the disqualification of trial judges in California courts are constitutional. Johnson v. Superior Court, 50 Cal. 2d 693, 329 P. 2d 5 (1958). While the burden of proof, to be sure, is shifted to the moving party, this is inevitable. It is the moving party who has something to prove, and until the moving party has proven otherwise, the judge is deemed fit and able to perform his duties. A court system could not function properly with a presumption of judicial incapacity, which apparently is what appellant wants.[2/]

B. Section 1203 of the Penal Code is Constitutional.

Appellant also challenges the constitutionality of section 1203 of the Penal Code. More specifically, he

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2. For a more complete discussion of the factual situation underlying appellant's attack on the disqualifying procedures, we refer this Court to the opinion in People v. Chromiak, 4th Crim. 2471. (A copy of said opinion was attached to Response to Petition for Writ of Habeas Corpus, USDC No. 67-973-Y.)

questions that portion of the statute which states:

> "In unusual cases, otherwise subject to the preceding paragraph, in which the interests of justice would best be served thereby, the judge may, with the concurrence of the district attorney, grant probation."

Appellant does not indicate why he takes issue with this particular aspect of the State of California's probation system or why he finds this section has any relevance to his case. Insofar as can be determined from the record, appellant did not fall into that class of people otherwise ineligible for probation. Accordingly, the concurrence of the district attorney was not necessary to his admission to probation, and a resolution of the question he presents would not affect appellant's right. People v. Williams, 247 Cal. App. 2d 169, 172, 55 Cal. Rptr. 434 (1966).

In any event, the statute in question is constitutional and is not violative of the due process guarantees of the Fourteenth Amendment to the United States Constitution. The probation statute, to be sure, does not set any ostensible standards for the exercise of the district attorney's discretion in concurring in the granting of probation. Nor does the statute set any standards for the exercise of the judge's discretion. Yet it has been consistently held that although the granting of probation is entirely in the discretion of the trial judge, People v. Loeber, 158 Cal. App. 2d 730, 736, 323 P. 2d 136 (1958), his decision cannot be sustained where there is abuse of discretion. People v. Connolly, 103 Cal. App. 2d 245,

248, 229 P. 2d 112 (1951). The decision of a trial judge cannot be arbitrary or capricious but must be exercised within the spirit of the law. People v. Wade, 53 Cal. 2d 322, 338, 1 Cal. Rptr. 683, 348 P.2d 1167 (1959).

The exercise of the district attorney's discretion under this statute is bound by the same standards, and there is no reason to believe the appellate courts of the State of California will not examine the district attorney's use of his discretion as they examine the trial court's. There is nothing in the history or case law surrounding the statute to indicate the district attorney has absolute discretion. The discretion he does have is only sufficient to enable the probation laws to operate flexibly and effectively.[3/]

II

THE TRIAL COURT WAS NOT PREJUDICED AGAINST APPELLANT

Appellant contends that the trial court's listening to a tape recording of a conversation he made was sufficient to establish that the trial court was prejudiced and that appellant was denied an impartial trial.

Appellant further seems to contend that the tape recording resulted from an illegal wire tap. He raises this point for the first time in this appeal. Neither his petition for a writ of habeas corpus nor any other pleadings he has

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3. As to the cluster of facts underlying the matter of his request for probation, these, too, are set forth in the respondent's brief in People v. Chromiak, 4th Crim. 2471. (A copy of said brief was attached to Response to Petition for Writ of Habeas Corpus, USDC No. 67-973-Y.)

filed make mention of any wire tapping. This Court will not consider claims raised for the first time on appeal. Thomason v. Klinger (U.S.D.C. 9th Cir. 1965) 349 F. 2d 940.

The records of the trial do not reveal any illegal wire tapping. Rather, the record shows that the trial judge, in an affidavit, stated he had listened to the tape recording of a conversation between appellant and another person at a time when the judge believed the appellant had no attorney of record. At this point the judge was concerned about reducing the appellant's bail and felt that as this was a matter within the court's discretion, he had an obligation to inquire as fully as possible into all matters bearing relevantly upon the question of bail and the exercise of his discretion. A copy of Affidavit of the Honorable Gerald C. Thomas, Judge of the Superior Court, in and for the County of San Diego, State of California, filed in San Diego Superior Court Case No. CR-5926, is attached hereto as Appendix I.

While the court, perhaps, should not have heard evidence against appellant out of appellant's presence, he did so because he believed that appellant did not have counsel. This belief, even if erroneous, did not result from nor cause prejudice. It was what it was -- a mistaken belief. In any event, the trial court made no attempt to conceal from the appellant that he had heard this tape recording. The trial judge very candidly revealed to appellant what he knew.

There was nothing to indicate that the tape recording was illegally or improperly obtained, and appellant does not indicate how hearing this tape recording in fact prejudiced

the court. Appellant's counsel at trial did not believe that there was anything damaging in the recording (Rep. Tr. p. 10), while the judge indicated he did not consider the tape recording in determining whether to grant probation. (Cl. Tr. pp. 13-14.) Appellee accordingly submits that the ex parte proceedings whereby the court listened to the recording did not in any way prejudice appellant.

Certainly, the right to a fair trial includes, as appellant contends, the right to an impartial judgment. Sheppard v. Maxwell, (S.D. Ohio, E.D. 1964) 231 Fed. Supp. 37, 66. The Sheppard case, however, on which appellant relies turned on the fact that the judge, prior to the trial, had said, among other things, "Sam Sheppard is as guilty as he [the judge] was innocent," and, "Well, he [Sheppard] is as guilty as hell." And by making these statements, the judge committed himself to Sheppard's guilt. The trial court in the present case made no statement indicating that he had prejudged the matter, and had no commitment to a particular position on the case.

CONCLUSION

For the reasons stated, appellee respectfully submits that the order denying the petition for writ of habeas corpus be approved.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General

WILLIAM E. JAMES,
Assistant Attorney General

STANTON J. PRICE,
Deputy Attorney General

Attorneys for Appellee

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Stanton J. Price

STANTON J. PRICE
Deputy Attorney General

CR LA
67-926
SJP:kv
4-25-68

APPENDIX I

FILED
FEB 7 196[illegible]
R. B. JAMES, Clerk
By [signature] Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GEORGE CHROMIAK, Defendant.	No. CR-[illegible] AFFIDAVIT OF THE HONORABLE GERALD C. THOMAS, JUDGE OF THE SUPERIOR COURT, IN AND FOR THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

The declarant is the trial judge in the above entitled cause and action. None of the action taken by the declarant in this cause and action was taken as a result of bias and prejudice, but rather was taken as a result of an exercise of his judicial discretion based upon the law and the evidence at each stage of the proceedings.

The declarant is not biased or prejudiced toward the defendant so as to deprive the affiant of his judicial objectivity in taking such further action in such cause and action as he may deem appropriate within his judicial discretion.

The declarant did listen to a recording of a conversation purportedly held between the defendant and some other person out of the presence of the declarant, at a time when the defendant had no attorney of record before the court of which the affiant is a judge. This was at a time when it was anticipated that the defendant intended to move for a reduction of bail and such information was received by the court at that time for the purpose of considering bail only. As bail on appeal after sentencing to prison is a matter of discretion with the court by the terms of Section 1272 of the Penal Code of this State,

APPENDIX I, p. 1

The court considered the duty to undertake an inquiry as to all relevant matters bearing on the exercise of that discretion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California, this 7th day of February, 1966.

GERALD C. THOMAS

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JOHN GARVEY, being first duly sworn, depose and say:

I am a citizen of the United States, over eighteen years of age and not a party to the within cause; my business address is 600 State Building, Los Angeles, California 90012; I served a copy of the attached APPELLEE'S BRIEF on the following by placing same in an envelope addressed as follows:

NERI RAMOS, ESQ.
234 Van Ness Avenue
San Francisco, California 94105

Said envelope was then, on April 26, 1968, sealed and deposited in the United States mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on April 26, 1968, at Los Angeles, California.

/s/ JOHN GARVEY

JOHN GARVEY

Subscribed and sworn to before me
this 26th day of April, 1968.

/s/ MAUDE HONEYWILL

MAUDE HONEYWILL
Notary Public in and for said
County and State